UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: SOCIAL MEDIA ADOLESCENT ADDICTION/PERSONAL INJURY PRODUCTS LIABILITY LITIGATION	MDL No. 3047 Case No.: 4:22-md-03047-YGR-PHK
This Filing Relates to: *All bellwether cases*	**JOINT LETTER BRIEF REGARDING PLAINTIFFS' INITIAL DISCLOSURES OF TREATER WITNESSES** Judge: Hon. Yvonne Gonzalez Rogers Magistrate Judge: Hon. Peter H. Kang

Dear Judge Kang:

Pursuant to the Court's Standing Order for Discovery in Civil Cases, Plaintiffs and Defendants respectfully submit this joint letter brief regarding each bellwether personal injury Plaintiff's Initial Disclosures listing up to ten treater witnesses.

Pursuant to the Discovery Standing Order and Civil Local Rule 37-1, the Parties attest that they met and conferred by video conference, email, and correspondence on numerous occasions before filing this brief. On January 3, 2025, lead trial counsel for the Parties involved in the dispute attended the final conferral. Because all lead counsel are not located in the geographic region of the Northern District of California or otherwise located within 100 miles of each other, they met via videoconference. Lead trial counsel have concluded that no agreement or further negotiated resolution can be reached.

The parties will be prepared to address these disputes at the Court's earliest convenience, including at the January 16, 2025, Discovery Management Conference.

Dated: January 13, 2025

Respectfully submitted,

/s/ *Megan. M. Egli*

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ATTESTATION

I, Megan M. Egli, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

Pursuant to Section H of this Court's Standing Order in Civil Cases, lead counsel for Plaintiffs and each of the Defendants attended the final meet-and-confer on January 3, 2025, which was conducted via a videoconference Zoom meeting, as lead counsel were in attendance from locations across the country more than 100 miles apart.

Dated: January 13, 2025 /s/ *Megan M. Egli*

Defendants' Position: The Court has imposed a 30-hour limit for Defendants to take fact depositions in each bellwether case. The Court set that limit with the understanding that Defendants would likely need to depose a small number of treating physicians. *See* 2/22/24 DMC Tr. 53:1–17. Yet, each bellwether PI Plaintiff's Initial Disclosures list up to 10 treater witnesses (with an average of 6.3 per case). Plaintiffs essentially acknowledge the overbreadth of their initial disclosures by conceding a need to identify "key" treaters, yet seek to maintain the rights to utilize declarations prepared by non-key treaters. Defendants cannot feasibly depose that volume of treaters within the 30-hour limit and the compressed fact discovery period that Plaintiffs secured.

The parties have negotiated extensively a way to limit the number of treater depositions. Plaintiffs have agreed to disclose by January 10 one or two "key" treaters they may use to support their claims. In other words, Plaintiffs are supposed to identify the "key" treaters whose testimony they may present in each bellwether case. Plaintiffs further agreed that their experts will not rely on conversations with undeposed treaters and that, in the event a Plaintiff lists a non-"key" treater on their trial witness list, Defendants would have the ability to depose such treater sufficiently in advance of trial, even if Defendants have already exhausted their 30 hours.[1] Such agreements have significantly narrowed the dispute, but one significant issue remains: Plaintiffs insist that they retain the ability to present declarations or affidavits from non-"key" treaters (who have never been deposed) in connection with Rule 702 or summary judgment briefing.

Plaintiffs' proposed reservations would effectively require Defendants to prophylactically depose all 69 treaters listed on Plaintiffs' Initial Disclosures.[2] Indeed, if Plaintiffs can submit a declaration from any treater, Defendants would need deposition testimony from each treater so that they have a record to test or otherwise challenge any such declaration. But Defendants are unable to do so during the fact discovery period, given the 30-hour limitation for depositions in each bellwether case. Moreover, Defendants are barred from having conversations with Plaintiffs' healthcare professionals outside the context of depositions. *See* ECF No. 1206, at 2.

Nor is there time in the schedule to defer these depositions until dispositive briefing is served. With just 28 days between the deadlines for Plaintiffs' Rule 702 and summary judgment oppositions (October 27, 2025) and Defendants' replies (November 25, 2025), Defendants cannot realistically schedule the depositions of busy healthcare professionals and incorporate the resulting testimony in those short periods. *See* CMO 17, ECF No. 1159.

In short, Plaintiffs' reservation would force Defendants to depose all 69 treaters listed in the 11 remaining bellwether Plaintiffs' initial disclosures (in addition to any non-disclosed treating physicians Defendants may wish to depose) prior to April 4.[3] Because there is neither time in the

[1] In connection with such agreement, Plaintiffs have reserved the ability to "swap out" their "key" treaters within 5 days of the Plaintiff's deposition in good faith, with Defendants reserving the ability to object to such substitution.

[2] At the same time, Plaintiffs are complaining about the number of depositions Defendants are noticing, as detailed in joint letter brief on that issue, which Plaintiffs insisted be kept separate from this one.

[3] For these reasons, this issue is ripe for resolution now and cannot be delayed until Plaintiffs serve their briefing on dispositive motions.

schedule nor room in Defendants' 30-hour limit to do so, this creates a serious problem. Absent relief, Plaintiffs could try to create a genuine issue of fact at summary judgment by presenting a declaration from a non-"key" treater that Defendants never had the ability to depose. Indeed, this appears exactly what Plaintiffs plan to do as they added this condition at the very end of the parties' negotiations. This problem cannot wait until summary judgment briefing to be resolved. It will be too late then.

Defendants respectfully request that the Court enter an order that Plaintiffs are precluded from relying on declarations or affidavits from non-"key" treaters in connection with Rule 702 or summary judgment briefing. If the Court is not inclined to enter such an order, the framework agreed upon by Defendants becomes fundamentally unfair. Alternatively, Defendants request that the Court require Plaintiffs either: (1) to narrow their lists of individuals identified pursuant to Rule 26(a)(1)(A)(i) to no more than eight individuals (including percipient non-treater witnesses); or (2) to enlarge the per-case deposition limit to 50 hours. As Judge Kuhl recognized in granting Defendants additional deposition time in cases selected for trial, 30 hours for a "complicated case" like these "is a small amount." 11/14/24 CMC 48:20-50:18.

Plaintiffs' Position: The Court should deny Defendants' premature and unfair request to constrain how Plaintiffs support their briefing in opposition to Defendants' anticipated summary judgment and Rule 702 motions.

As a threshold matter, the dispute raised by Defendants is hypothetical and not ripe for judicial intervention. Plaintiffs have no present intention of relying on affidavits or declarations from treatment providers who have not been deposed. Defendants, therefore, effectively seek an advisory evidentiary ruling based on an abstract and speculative disagreement.

Even assuming Plaintiffs were to submit a non-deposed treatment provider's affidavit or declaration in connection with summary judgment or Rule 702 briefing, Plaintiffs have already cured any prejudice as to which Defendants could rightly complain. Plaintiffs have committed to allowing Defendants to depose any non-deposed treatment provider whose affidavit or declaration is submitted. This commitment ensures Defendants would have a full and fair opportunity to challenge such evidence before trial.

Plaintiffs have offered more than the law in this jurisdiction actually requires. In *Intel Corp. v. VIA Techs., Inc.*, 204 F.R.D. 450, 452 (N.D. Cal. 2001), the Court held that, "[i]f a witness is properly disclosed, there can be no FRCP 26 bar … to previewing [their] testimony in a written form" during summary judgment. That remains the case even if the opposing party did not take the witness's deposition during the discovery period—though that party "may request leave to re-open discovery upon a showing of good cause" in order to do so. *Id.* In an effort to ensure the discovery process is as efficient as possible, Plaintiffs have eliminated the need for Defendants to make such a "good cause" showing to the Court and given them the ability to take such depositions as of right.

In addition to agreeing that Defendants may depose any non-"key" treatment providers Plaintiffs identify as trial witnesses—even if Defendants have exhausted their deposition time for that case—Plaintiffs have taken other substantial steps, in the spirit of cooperation and compromise,

to ensure the discovery process is fair and efficient for Defendants. Plaintiffs have: (1) agreed to identify key treatment providers whose depositions would provide the most relevant information for both parties; (2) agreed Defendants may depose other treatment providers of their choosing during the fact discovery period, subject to applicable deposition limits; and (3) committed to working in good faith with Defendants regarding any requested extensions of the 30-hour deposition limit in individual cases.

Rather than reciprocating Plaintiffs' good faith efforts, Defendants' proposal seeks to impose unfair and unnecessary restrictions of a kind Defendants have not and never would agree to. Defendants have never once indicated that *they* would restrict the affidavits or declarations they present at summary judgment to only non-deposed fact witnesses. And for good reason: a party cannot reasonably predict every argument its adversary may raise at summary judgment or in Rule 702 motions. There is no precedent for imposing prior restraints on the potentially critical evidence a party wishes to present where that evidence appropriately has been disclosed pursuant to Rule 26(a)(1).

For the avoidance of doubt, Plaintiffs have made exactly such a disclosure. Rule 26 requires disclosure of individuals "that the disclosing party ***may*** use to support its claims or defenses." That is the list Plaintiffs provided. Defendants' request in the alternative that Plaintiffs be forced to narrow their initial disclosures in effect seeks to punish Plaintiffs for doing too thorough a job. It demands that the Court lock Plaintiffs into a fixed and exhaustive list of trial witnesses, even though such a list is not *actually* due for months. *See* CMO No. 17, ECF No. 1159 (setting exchange of preliminary witness lists for September 10, 2025). This is not how Rule 26 is written and therefore not how it works. Plaintiffs will provide their trial witness list at the appropriate time pursuant to the Court's scheduling order.

Discovery is inherently imperfect, and no party is entitled to absolute certainty regarding the evidence that may be presented at later stages of litigation. Defendants' request for preemptive restrictions disregards the practical realities of litigation and undermines fundamental principle of fairness.